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MICHAEL RODAK, JR.

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1237

HONORABLE WILLIAM WALTER MEANS, DISTRICT JUDGE,
14TH JUDICIAL DISTRICT, TULSA COUNTY, OKLAHOMA,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BRIEF OF RESPONDENT IN OPPOSITION

LARRY DERRYBERRY
Attorney General of Oklahoma
112 State Capitol Building
Oklahoma City, Oklahoma 73105
MARVIN C. EMERSON
First Assistant Attorney General

Counsel for Respondent

April, 1974

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0080

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OPINIONS BELOW

The opinion of the Oklahoma Court of Criminal Appeals on a petition for writ of prohibition in the State of Oklahoma *ex rel.*, S. M. Fallis, Jr., District Attorney of Tulsa County, Oklahoma, vs. the Honorable William Walter Means, District Judge, Fourteenth Judicial District, Tulsa County, Oklahoma, respondent, Case No. P-73-178, is attached as an appendix to the petition for a writ of certiorari in this case and will not be attached to the brief in opposition.

JURISDICTION

The State of Oklahoma would challenge the jurisdiction as set out in the petition for writ of certiorari, and the arguments thereto will be set forth in this brief.

QUESTIONS PRESENTED FOR REVIEW

1. Does the petitioner herein have standing to raise the question of First Amendment rights in the present case?

2. Does the petitioner herein have standing under Article III of the United States Constitution to maintain this action as a writ of certiorari?

3. Do the rights under the First Amendment of the United States Constitution as alleged in the petition for writ of certiorari apply to the petitioner in this case?

4. Has the petitioner herein alleged a justiciable issue as required by Article III of the United States Constitution?

STATEMENT OF FACTS

The petitioner herein is a District Judge in the Fourteenth Judicial District, Tulsa County, Oklahoma, and was the trial judge assigned to try the following cases: *State* v. *Betty Jean Teerhune*, CRF-73-744; *State* v. *Morris*, CRF-73-746; *State* v. *Combs*, CRF-73-747; *State* v. *Moses*, CRF-73-748; *State* v. *Oliver*, CRF-73-740; and *State* v. *Henry*, CRF-73-877.

The defendants in the above styled cases have been charged in the District Court of Tulsa Couity and a preliminary hearing was had in all cases and all defendants

were bound over for trial. Upon the cases being assigned to the trial court, a hearing was had on motions to suppress on July 24, 1973, before the Honorable Judge Means. The petitioner at that time made a ruling suppressing the evidence and it was his decision to dismiss the cases. Before dismissal of the cases, the District Attorney of Tulsa County, Oklahoma, asked that the decision of the Court be withheld pending an appeal by the State. An appeal was perfected by the State by a writ of prohibition to the Court of Criminal Appeals and that Court issued an order of prohibition to the Honorable Judge Means and reinstating the cases for trial. Those six cases are presently still pending on the trial docket in Tulsa County, Oklahoma.

From the order of the Court of Criminal Appeals of the State of Oklahoma, the petitioner has filed his petition for certiorari with this Honorable Court.

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari as filed herein challenges the ruling of the Court of Criminal Appeals of the State of Oklahoma, alleging that the order of that Court on the writ of prohibition is denying the petitioner his First Amendment rights. The petitioner further alleges that his rights under the Fourteenth Amendment of the United States Constitution have been violated in a procedural process on the writ of prohibition in the state court.

The State alleges that no First Amendment rights of the petitioner herein have been violated by this order and that the petitioner has presented no justiciable issue which can be decided by this Honorable Court on a writ of certi-

orari. The State therefore contends that the petition for a writ of certiorari should be denied.

The argument in this case will be set out in two propositions below.

ARGUMENT

PROPOSITION I

THE COURT SHOULD NOT GRANT CERTIORARI AS TO THE FIRST AMENDMENT QUESTION AS THOSE QUESTIONS DO NOT PERTAIN TO THE PETITIONER HEREIN AND THAT FURTHER, THOSE QUESTIONS HAVE NOT BEEN FINALLY DETERMINED BY THE HIGHEST STATE COURT.

The petitioner in this case is Judge of the District Court of Tulsa County, Oklahoma, and was assigned as trial judge on six cases. Those six criminal cases involved the question presented in *Miller* v. *California*, — U.S. —, 37 L.Ed.2d 419, 93 S.Ct. —, and *Paris Adult Theatre* v. *Slaton*, — U.S. —, 37 L.Ed.2d 446, 93 S.Ct. —, as decided June 21, 1973. In those six cases, the defendants had all been bound over for trial after a preliminary hearing.

The Honorable Judge Means on a hearing on a motion to suppress, held that the evidence should be suppressed and withheld his ruling to dismiss the cases, until the State was able to appeal to the Court of Criminal Appeals for the State of Oklahoma.

The District Attorney of Tulsa County, Oklahoma, took an appeal by way of writ of prohibition to the Court of Criminal Appeals and that Court issued the writ and in effect reversed the ruling of Judge Means.

The Court of Criminal Appeals of the State of Oklahoma, in no way decided any of the constitutional rights of the six original defendants. The Court in making its decision also did not decide any of the First Amendment rights of the petitioner herein.

The reversal of the ruling in the state court did not touch upon the First Amendment question presented in this case by the petitioner. The state court, by its ruling, did not in any way infringe upon the First Amendment rights of Judge Means. The First Amendment rights as alleged in the petition would only be as to the defendants in the six criminal cases still pending in the District Court of Tulsa County, Oklahoma.

Therefore the defendants in the six criminal cases, still have all the state remedies available to them and are not original parties to this suit. *Street* v. *New York* (N.Y. 1969), 89 S.Ct. 1354, 394 U.S. 576, 22 L.Ed. 572, *on remand* 302 N.Y.S. 448, 24 N.Y.2d 1026, 250 N.E. 250, and *Evans* v. *Delaware County, Pennsylvania* (C.A. Pa. 1968), 390 F.2d 617, *cert. denied* 89 S.Ct. 164, 393 U.S. 873, 21 L.Ed.2d 143.

Therefore, the State of Oklahoma respectfully prays that certiorari be denied, as to the First Amendment questions presented in the brief of the petitioner, for the foregoing reasons.

PROPOSITION II

CERTIORARI SHOULD BE DENIED AS NO JUSTICIABLE ISSUE HAS BEEN PRESENTED AS REQUIRED BY ARTICLE III OF THE UNITED STATES CONSTITUTION.

This case arose from an order of the Court of Criminal Appeals of the State of Oklahoma on a writ of prohibition, directed to the petitioner herein. The petitioner is challenging the right of the Oklahoma Court of Criminal Appeals to issue the writ. There are no allegations by the petitioner that he has been harmed or injured by the ruling in any way.

The summary ruling by the state court is a procedure which is used not only in the extraordinary writs in that court, but in regular and post conviction appeals. Therefore, that court did not abuse the right of petitioner in deciding the writ without argument or a brief. Petitioner was sent a copy of the petition on the filing of that document in the state court.

If he had wanted to challenge the jurisdiction of the court, it should have been done at the time of receiving notice of such filing before the court summarily decided the issue.

The order of the state court, in effect, only sent the six cases involved back to the petitioner and the District Court of Tulsa County, Oklahoma, for trial. That order did not affect the petitioner's constitutional rights in any way, except for the trial of the six cases.

The order of the state court did not answer any of the First Amendment questions which were attempted to be

resented here and the state court has now, on appeal, the uestions presented in *Miller* and *Paris, supra*. Those cases n appeal with the Court of Criminal Appeals of the State f Oklahoma did not involve any of the original six de-endants in the cases in the petitioner's court.

The petitioner herein has not shown how he would be dversely affected by this ruling. His only complaint is that llegal arrests might be made, which is a question the state ourts have not decided. The only inference which can be drawn from the petition for writ of prohibition and the opinion in the state court, is that the petitioner acted without jurisdiction. It should be noted that the petition for a writ of prohibition in the state court prayed that the petitioner be prohibited from acting without authority and jurisdiction.

The question of due process in this case, is not the actual point which is sought to be considered. The real questions, are those of the First Amendment rights as previously set out.

We would therefore seriously question the standing of the petitioner to maintain this action. The petitioner herein has no personal stake in the outcome of the questions involving the First Amendment rights of the original six defendants. The order on a petition of writ of prohibition did not adversely affect the petitioner in any way.

The interest of the petitioner and the State of Oklahoma should be and are the same. That is to see that justice is done in all cases.

The petitioner in this action is not being placed in a position of a criminal prosecution and cannot suffer any effects from the decision as in *Jenkins* v. *McKeithen*, 395 U.S. 411, 23 L.Ed.2d 404, 89 S.Ct. 1843.

The petitioner will not suffer any physical or economic detriment as in *Flast* v. *Cohen*, 392 U.S. 83, 20 L.Ed.2d 947, 888 S.Ct. 1942.

The only averments of injury that appear in the petition for writ of certiorari are simple allegations in a general and speculative nature. The petitioner has not shown any real injury, either past, present or future, which he has suffered. He has therefore failed to meet the requirements imposed by Article III of the United States Constitution. *O'Shea* v. *Littleton*, — U.S. —, 38 L.Ed. 674, 94 S.Ct. —.

Therefore, since petitioner does not have any personal stake in the outcome, *Baker* v. *Carr*, 369 U.S. 186, 7 L.Ed.2d 663, 82 S.Ct. 891 (1962), and since there is no adverse interest to be served, *Aetna Life Insurance Company* v. *Haworth*, 300 U.S. 227, 81 L.Ed. 617, 57 S.Ct. 461, 108 A.L.R. 1000 (1937), the State respectfully requests that certiorari be denied herein.

CONCLUSION

For the foregoing reasons, it is the position of the State of Oklahoma, that a writ of certiorari should not issue as there are no constitutional questions to be decided by this Court as to this petitioner and that the petitioner has not shown an issue to be decided by this Honorable Court.

Respectfully submitted,

LARRY DERRYBERRY
Attorney General of Oklahoma
112 State Capitol Building
Oklahoma City, Oklahoma 73105
MARVIN C. EMERSON
First Assistant Attorney General

Counsel for Respondent

April, 1974

CERTIFICATE OF MAILING

This is to certify that I mailed three copies of the instrument to which this certification is attached to the following named counsel of record, this _____ day of April, 1974:

Woodson and Gasaway
1843 East 15th Street
Tulsa, Oklahoma 74104

Marvin C. Emerson